

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWELFTH
JUDICIAL DISTRICT AT DAYTON

STATE OF TENNESSEE,
Plaintiff,

v.

R.C. EVERMAN, individually and
d/b/a Dyna-Body Fitness Center and
Monia L. Everman, individually and
d/b/a Dyna-Body Fitness Center,

Respondents

AGREED FINAL JUDGEMENT

Plaintiff, the State of Tennessee, by and through, Paul G. Summers, the Attorney General and Reporter, and on behalf of the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance, and Defendant, R. C. Everman, individually and doing business as Dyna-Body Fitness Center (collectively referred to as "R. C. Everman"), as evidenced by their signatures, do consent to the entry of this Judgment and its provisions. This is an Agreed Final Judgment for which execution may issue. This Order only resolves those matters set forth in the State's Complaint against R. C. Everman. R. C. Everman hereby accepts and expressly waives any claims of defect in connection with service of process issued on R. C. Everman in this cause by the State.

1. DEFINITIONS

As used in this Agreed Final Judgment, the following words or terms shall have the following meanings:

1.1 "Agreed Final Judgment", "Judgment" or "Order" shall refer to this document entitled Agreed Final Judgment between State of Tennessee and R. C. Everman in the matter of State of Tennessee v. R. C.

Everman, individually and doing business as Dyna-Body Fitness Center and Monia L. Everman, individually and doing business as Dyna-Body Fitness Center.

1.2 "Consumer" means any person, a natural person, individual, governmental agency, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.

1.4 "Division" or "Division of Consumer Affairs" shall refer to the Tennessee Division of consumer Affairs of the Department of Commerce and Insurance.

1.5 "Defendant" or "R. C. Everman" shall refer to R. C. Everman, individually and doing business as Dyna-Body Fitness Center.

1.6 "Plaintiff", "State of Tennessee", "State" or "Attorney General" shall refer to the Tennessee Attorney General & Reporter or the Office of the Tennessee Attorney General.

1.7 "Tennessee Consumer Protection Act" or "Consumer Act" shall refer to the Tennessee Consumer Protection Act of 1977 and related statutes found at Tenn. Code Ann. §§ 47-18-101, *et seq.*

1.8 "Tennessee Health Club statute" or "Health Club Act" shall refer to the statutes relating to the health clubs found at Tenn. Code Ann. §§ 47-18-301, *et seq.*

1.9 "Unenforceable health club agreement" shall refer to any and all health club agreements entered into by consumers while Defendant's health club was unregistered.

II. JURISDICTION

2.1 The parties to this Judgment agree that the Chancery Court of Rhea County, Tennessee has jurisdiction over the subject matter of this case and over the person of the Defendant R. C. Everman for the purposes of entering this Agreed Final Judgment. Jurisdiction is retained by the Court for the purpose of enabling the State to apply to the Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Judgment, including the enforcement or compliance therewith and penalties for violation thereof. Defendant agrees to pay all court costs and reasonable attorneys' fees associated with any successful petitions to enforce any provision of this Order against Defendant.

III. VENUE

3.1 Venue as to all matters between the parties relating hereto or arising out of this Order is solely in the Chancery Court of Rhea County, Tennessee.

IV. EFFECT OF ORDER AND ADMISSIONS OF DEFENDANT

4.1 This Honorable Court entered a Summary Judgment Order against R. C. Everman and Monia L. Everman on March 17, 1999. That order is incorporated herein by reference and continues in full force and effect against R. C. Everman after entry of this Order.

4.2 The Defendant R. C. Everman admits he jointly owned and operated a health club in Dayton, Tennessee and a health club in Spring City, Tennessee with his former wife, Monia L. Everman. Further, R. C. Everman admits that he jointly operated with Monia L. Everman the Dayton health club without a valid Certificate of Registration from April 1, 1992 through October 6, 1997. R. C. Everman also jointly operated with Monia L. Everman the Spring City health club without a valid Certificate of Registration from September 20, 1992 through October 31, 1994.

4.3 The Defendant enters into this Judgment in order to resolve the allegations solely against R. C. Everman individually alleged in the State's Complaint. Defendant admits the allegations set forth in the State's Complaint.

V. HEALTH CLUB AGREEMENTS

5.1 All health club agreements signed by consumers while R.C. Everman and Monia Everman's health clubs located in Dayton and Spring City were unregistered are unenforceable against the buyer, and the buyer is entitled to a full refund, less any payment representing actual use of the facilities or actual costs of goods and services consumed. Tenn. Code Ann. § 47-18-303.

5.2 By entering into contracts that purported to be binding upon consumers, when such contracts were in fact unenforceable against consumers, R. C. Everman represented that "a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law," in violation of Tenn. Code Ann. § 47-18-104(b)(12).

5.3 R. C. Everman has warranted to this Honorable Court that no consumer has made any complaints about the Dyna-Body fitness centers. However, if a consumer should request a refund for any reason then R. C. Everman shall within fourteen (14) days of such request refund to any consumer who cancels an agreement that portion of any down payment, enrollment fee, membership fee, or other fee that does not represent payment for actual use of the facilities and goods and services actually provided. R. C. Everman shall also provide written notice to the Division of any such refunds within ten (10) days of making the refund. Any such notice shall include the name and address of the consumer and the amount refunded to the particular consumer.

5.4 R. C. Everman has warranted to this Honorable Court that he has not initiated any collection efforts for failure to complete payment under an unenforceable health club agreement.

5.5 R. C. Everman is responsible for all costs associated with the refund process set forth in subsection 5, including, but not limited to, all costs associated with mailing, all letterhead, envelopes, copying charges,

postage and other costs associated with the issuance of refund checks.

5.6 Nothing herein restricts the applicability of Tenn. Code Ann. § 47-18-303 making contracts unenforceable if entered into under the terms set forth therein. Any consumer may cancel such contract and receive a full refund if the consumer entered into a health club agreement under the conditions set forth in that statute.

VI. PERMANENT INJUNCTION

Accordingly, it is hereby agreed by the Defendant R. C. Everman that immediately upon the execution of this Order, shall be permanently and forever enjoined and bound from directly or indirectly engaging in the practices set forth herein.

6.1 R. C. Everman shall not directly or indirectly, own, operate, manage, promote or be employed by a health club as defined by the Health Club Act in the State of Tennessee, unless the health club is in full compliance with the Health Club Act.

6.2 R. C. Everman shall be prohibited from directly or indirectly, representing, advertising, promoting or stating that any unenforceable membership agreements are enforceable against consumers. Unenforceable membership agreements include those agreements which were signed by consumers during the periods of time that the Dyna-Body fitness centers were operating without a valid certificate of registration from the Division.

6.3 R. C. Everman shall not, directly or indirectly, represent, state, promote, advertise or claim that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law.

6.4 R. C. Everman shall make and retain contemporaneous records of all consumer complaints or inquiries made orally or by telephone regarding the Dyna-Body fitness centers and shall make such records available to the State upon request within three (3) days.

6.5 R. C. Everman shall retain in an organized fashion all written material containing or representing consumer complaints or inquiries regarding the Dyna-Body fitness centers and make such materials available to the State upon request within three (3) days.

6.6 R. C. Everman shall directly or indirectly, state, represent or cause to be stated that the Attorney General, the Division of Consumer Affairs, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Defendants.

6.7 R. C. Everman shall allow any consumer who entered into a health club agreement with Dyna-Body, when Dyna-Bodys' health clubs were not registered with the Division, to cancel that agreement without further obligation to R. C. Everman.

6.8 R. C. Everman shall be prohibited from directly or indirectly, attempting to collect or collecting against any consumer or unenforceable membership agreements. Without limiting the scope of this section, R. C. Everman shall be required to notify all collection agencies to cease collection activities if collection efforts have been commenced against a consumer for failure to complete payment under the unenforceable health club agreements.

6.9 R. C. Everman shall be required to affirmatively correct any consumer's credit history or record upon which R. C. Everman or his agents have reported negative information relating to an unenforceable Dyna-Body health club agreement. Without limiting the scope of this section, R. C. Everman shall provide a copy of the affirmative correction to the affected consumer for their records and make these records available to the State, upon request within three (3) days of such request.

6.10 R. C. Everman shall not engage in any unfair or deceptive acts or practices in the conduct of his business. R. C. Everman shall abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, et seq., including, but not limited to, the sections of the Tennessee Health Club statutes regulating health clubs, Tenn. Code Ann. §§ 47-18-301 *et seq* .

6.11 R. C. Everman shall not fail to provide written notice, pursuant to Tenn. Code Ann. § 47-18-313(c), to the Division within ten (10) days after a health club or any of its locations ceases to conduct business.

VII. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

7.1 Pursuant to Tenn. Code Ann. § 47-18-108(b)(4), R. C. Everman shall pay the sum of One Thousand Two Hundred and Fifty Dollars and No/100 (\$1,250.00) to the State of Tennessee to reimburse the State for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Said payment shall be made as set forth in paragraph 9.

VIII. CIVIL PENALTIES

8.1 Pursuant to Tenn. Code Ann. § 47-18-108(b)(3), R. C. Everman shall pay a civil penalty of One Thousand Two Hundred and Fifty Dollars and No/100 (\$1,250.00) to the State of Tennessee for his violations of the Tennessee Consumer Protection Act and the Tennessee Health Club statutes. Said payment shall be made as set forth in paragraph 9.

IX. FORBEARANCE ON EXECUTION AND DEFAULT

9.1 No execution or garnishment on the monetary portion of this Agreed Final Judgment shall issue so long as R. C. Everman makes payment in accordance with paragraph 9.3 herein. In the event R. C. Everman fails to make any such payment within twenty (20) days of their due date, the entire balance of this Agreed Final Judgment then remaining may be collected by execution, garnishment or other legal

process, together with interest pursuant to Tenn. Code Ann. §47-14-121 from the date of entry of this Agreed Final Judgment. R. C. Everman agrees to pay attorneys' fees and costs associated with any such collection efforts.

9.2 Payment shall be made to the Consumer Protection Division, Office of Attorney General as follows: \$75.00 due August 1, 1999 and \$75.00 the first of each month thereafter until the entire amount has been paid. All payments shall be certified or cashiers checks made payable to the State of Tennessee.

9.3 R. C. Everman shall be required to retain proof of all payments to the State in the form of canceled checks for each payment for a full 24 months following the final payment to the State. R. C. Everman shall provide proof of all payments to the State within ten (10) days of a request for such information.

9.4 R. C. Everman agrees that any and all such sums are non-dischargeable in a bankruptcy proceeding given the same are punitive in nature.

X. REPRESENTATIONS

10.1 The acceptance of this Order by the State shall not be deemed approval by the State of any of R. C. Everman's advertising or business practices.

10.2 R. C. Everman shall not represent or imply that any procedure or other acts or practices hereafter used or engaged in by R. C. Everman has been approved, in whole or in part, by the State.

10.3 Defendant, R. C. Everman, individually and doing business as Dyna-Body Fitness Center, warrants and represents that it is the proper party to this Order. Defendant further acknowledges that it understands that the State expressly relies upon this representation and warranty, and that if it is false, misleading or inaccurate, the State may move to vacate or set aside this Order, or may request that Defendant be held in contempt, if it so elects.

10.4 Defendant, R. C. Everman represents that it is his true legal name. The Defendant understands that the State expressly relies upon this representation and if said representations are false, inaccurate or misleading the State has the right to move to vacate or set aside this Order or request that the Defendant be held in contempt, if it so elects.

XI. PENALTY FOR FAILURE TO COMPLY

11.1 R. C. Everman understands and acknowledges that pursuant to the provisions of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-108(c), any knowing violation of the terms of this Order shall be punishable by civil penalties of not more than Two Thousand Dollars (\$2,000.00) for each violation, in addition to any other appropriate sanctions including contempt sanctions and the imposition of attorneys' fees.

11.2 R. C. Everman understands that upon execution and filing of this Order, any subsequent failure to comply with the terms hereof is prima facie evidence of a violation of the Tennessee Consumer Protection Act.

XII. ADDITIONAL REPRESENTATIONS AND WARRANTIES

12.1 R. C. Everman represents and warrants that the execution and delivery of this Order is his free and voluntary act, that this Order is the result of good faith negotiations, and that the parties believe that the Order and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Order in good faith. Defendant further represents that the signatories for Defendant have the authority to act for and bind him. Further, no offer, agreements, or inducements of any nature whatsoever have been made to it by the State of Tennessee, its attorney or any employee of the Attorney General's Office or the Division of Consumer Affairs to procure this Agreed Final Judgment.

12.2 R. C. Everman shall not participate, directly or indirectly, in any activity to form any other entity for the purpose of engaging in acts prohibited by this Order, or for any other purpose which would otherwise circumvent any part of this Order.

12.3 Neither R. C. Everman nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division of Consumer Affairs, the Department of Commerce and Insurance, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of R. C. Everman.

12.4 This Order constitutes the complete agreement of the State of Tennessee and R. C. Everman with regard to this Chancery Court action. This Order may only be enforced by R. C. Everman and the State of Tennessee.

12.5 The titles and header to each section of this Order are for convenience purposes only and are not intended by the parties to lend meaning to any of the actual provisions of the Order.

12.6 This document shall not be construed against the Adrafter@ because both parties participated in the drafting of this document.

12.7 This Agreed Final Judgment constitutes the complete agreement of R. C. Everman and the State of Tennessee with regard to the resolution of the matters set forth in the State's Complaint. This Agreed Final Judgment is limited to resolving only matters set forth in the State's Complaint against R. C. Everman.

12.8 Nothing in this Order shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Order shall not bar the State or other governmental entity from enforcing laws, regulations or rules against R. C. Everman, Monia L. Everman or Dyna-Body Fitness Centers. Without limiting the scope of this provision, the Defendant has

been specifically informed and agrees that this settlement in no way settles, resolves or addresses any claims of violations of Tenn. Code Ann. § 47-18-301, *et seq.* and Tenn. Code Ann. § 47-18-101, *et seq.* which a criminal prosecuting law enforcement agency such as but not limited to, a District Attorney General may bring against them.

12.9 This Agreed Final Judgment shall be binding and effective against R. C. Everman upon R. C. Everman's signing the Agreed Final Judgment.

12.10 In the event the court does not approve this Agreed Final Judgment, this Judgment shall be of no force and effect against the State of Tennessee.

12.11 Nothing in this Agreed Final Judgment constitutes an agreement by the State of Tennessee concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

XIII. COMPLIANCE WITH OTHER LAWS

13.1 Nothing in this Order shall be construed as relieving R. C. Everman from the obligation to comply with any state or federal law, regulation or rule, nor shall any of the provisions of this Order be deemed to be permission to engage in any acts or practices prohibited by such law, regulation, or rule.

XIV. APPLICATION OF ORDER TO DEFENDANT AND HIS SUCCESSORS

14.1 R. C. Everman agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Order shall apply to R. C. Everman as well as to each of his partners, subsidiaries, affiliates, managers, related entities, agents, assigns, representatives, employees, successors, sales staff and any and all other persons or entities acting directly or indirectly on his behalf.

XV. MONITORING FOR COMPLIANCE

15.1 Upon request, R. C. Everman shall provide books, records or documents to the State at any time, and further, to informally, or formally under oath, provide testimony or other information to the State relating to compliance with this Order. R. C. Everman shall make any requested information available within one (1) week of the request, at the Office of the Attorney General in Nashville, Tennessee or at such other location within the State of Tennessee as is agreeable in writing to R. C. Everman and the Attorney General. This shall in no way limit the State's right to obtain documents, records, testimony or other information pursuant to any law, regulation, or rule.

XVI. PRIVATE RIGHT OF ACTION

16.1 Nothing in this Order shall be construed to affect any private right of action that a consumer or other person may hold against R. C. Everman.

XVII. FILING OF AGREED FINAL JUDGEMENT

17.1 Upon the execution of this Agreed Final Judgment, the Attorney General shall prepare and file this Agreed Final Judgment for the Court's approval. R. C. Everman hereby waives any and all rights which he may have to be heard in connection with judicial proceedings upon the Order. R. C. Everman agrees to pay all costs of filing such Order. R. C. Everman agrees that it consents to the entry of this Order without further notice.

XVIII. NOTIFICATION TO STATE

18.1 Any notices required to be sent by this Order shall be sent by United States mail, certified mail return receipt requested or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document. The documents shall be sent to the following addresses:

For the State:

Jeffrey L. Hill

Assistant Attorney General

Office of the Attorney General

Consumer Protection Division

425 Fifth Avenue North, 2nd Floor Nashville, TN 37243

For the Defendant:

R. C. Everman

18.2 For five (5) years following execution of this Order, Defendant shall notify the Tennessee Attorney General in writing at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as incorporation, dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Defendant's status that may effect compliance with obligations arising out of this Judgment.

XIX. PAYMENT OF COURT COSTS

19.1 All court costs associated with this action and any other incidental costs or expenses incurred thereby shall be borne by R. C. Everman. No costs shall be taxed to the State as provided by Tenn. Code Ann. § 47-18-116.

IT IS SO ORDERED, ADJUDGED AND DECREED.